91-513

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

DELMAS NORTHCUTT, a/k/a D. L.

NORTHCUTT, and LOU NORTHCUTT,

a/k/a MARTHA L. NORTHCUTT,

Petitioners

vs.

FEDERAL LAND BANK OF WICHITA,

a corporation, now Farm Credit Services,

Respondents

PETITION FOR WRIT OF CERTIORARI

TO REVIEW A DECISION ENTERED BY

THE SUPREME COURT OF THE STATE OF OKLAHOMA

APPENDIX

VOLUME II

DAN LITTLE #5462
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APPENDIX A

RELEASE FOR PUBLICATION BY ORDER OF COURT OF APPEALS
THE COURT OF APPEAL OF THE STATE OF OKLAHOMA

DIVISION III

FEDERAL LAND BANK OF WICHITA, a corporation, Appellee, vs. DELMAS NORTHCUTT, a/k/a D. L. NORTHCUTT, and LOU NORTHCUTT, a/k/a MARTHA L. NORTHCUTT; Appellants, and FIRST NATIONAL BANK, MADILL, OKLAHOMA; GLENN NORTHCUTT and TOMMYE NORTHCUTT; EXCHANGE NATIONAL BANK & TRUST COMPANY OF ARDMORE, OKLAHOMA; ACACIA PIPELINE CORPORATION, one and the same as ACACIA PIPELINE CORP.; NATURAL GAS PIPELINE CORP.; NATURAL GAS PIPELINE COMPANY OF AMERICA; KONAWA INSURANCE COMPANY, a corporation; and, EUGENE EMBRY, Defendants.	Case No. 72,579 FILED COURT OF APPEALS STATE OF OKLAHOMA FEB 12, 1991 JAMES W. PATTERSON, CLERK

APPEAL FROM THE DISTRICT COURT OF
MARSHALL COUNTY, OKLAHOMA

HONORABLE TIMOTHY K. COLBERT, JUDGE

AFFIRMED

Blaine Schwabe,
Oklahoma City, Oklahoma, For Appellee,

Dan Little,
Madill, Oklahoma, For Appellants.

Opinion by Stewart M. Hunter, Chief Judge.

Appellants, Delmas and Lou Northcutt (Northcutts), the only defendants to appeal from the summary judgment granted by the district court, executed a promissory note and mortgage in favor of Appellee, Federal Land Bank of Wichita (Bank), on June 9, 1982, in the principal sum of $650,000.00, secured by certain real estate used in farming. On March 26, 1986, Bank filed a petition for foreclosure in Marshall County District Court alleging that the note and mortgage were in default since October 1, 1985. On August 19, 1987, Bank waived personal judgment and requested the case be set down for a nonjury trial. On October 5, 1988, Bank filed a motion for summary judgment based upon an affidavit attached and the answers of the Northcutts (and of other parties to the action for purposes of priority). The affidavit attached included pertinent facts

concerning the making the note and mortgage, the default and the amount of indebtedness, interest accumulated, set-off, and total amounts due.

The Northcutts filed a response contending that there were genuine issues of material facts, to-wit: Bank had not complied with the Agricultural Credit Act of 1987 (12 USCS §§ 2201-2207) [sic] and other pertinent regulations (7 USCS §§ 5101-5106); that the interest rates applied by Bank were incorrect; and, that the amount of indebtedness owed had been improperly calculated. Only the contention that Bank had not complied with applicable statutory regulations was specifically controverted by statements of the Northcutts and was supported by admissible evidence. Because allegations of the Northcutts that the amount of the indebtedness and the interest rates were not properly calculated by Bank are not

supported by admissible evidence, Bank's allegations of the amounts and rates are deemed admitted for the purpose of summary judgment. 12 O.S. 1981, Ch.2, App. District Court Rule 13(b).

The Northcutts argued to the trial court in opposition to Bank's motion for summary judgment that Bank had not yet completed participation in restructuring and medication prior to continuation of its foreclosure action. The Northcutts contended in the trial court and now on appeal that the Agricultural Credit Act of 1987 mandated consideration of restructuring of farm loans and mediation participation before foreclosure is allowed. This act provides in pertinent part codified at 12 USCS § 2202A(b)(3): "No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any

pending consideration of the loan for restructuring under this section." There was no doubt raised that Appellants, Appellee, and the loan in question were all subjects of this law. The Northcutts do not deny that Bank in fact considered their loan for restructuring. Their loan, however, was judged by Bank's Credit Review Committee to not be worthy of restructuring.

The Northcutts further contended at the trial court and now on appeal that Bank was also required to participate in a state mediation program before the foreclosure could proceed. Appellants' assertion is without authority and is not borne out by the statutes. The statutes requiring good faith participation in mediation , 7 USCS §§ 5101-5106, do not make it a condition precedent to foreclosure. The trial court held that mediation was not required as a matter of law before the foreclosure could be entered.

Thus, whether Bank participated in mediation in good faith was not a substantial issue of material fact in this case. We do note that Bank did submit itself to mediation and attended the first hearing, but that the Northcutts did not pursue mediation.

"Summary judgment is appropriate only when it appears there is no substantial controversy as to any material fact and that one of the parties is entitled to judgment as a matter of law" 12 O.S. 1981, Ch. 2, App. District Court Rule 13. Flanders v. Crane Co., 693 P.2d 602 (Okl. 1984). We find upon review of the pleadings, briefs, evidence and transcripts that the trial court correctly found that there is no substantial controversy as to any material fact and that Bank was entitled to judgment as a matter of law.

AFFIRMED.

GARRETT, P.J. concurs;
HANSEN, J. dissents.

IN THE DISTRICT COURT OF MARSHALL COUNTY,

STATE OF OKLAHOMA

THE FEDERAL LAND BANK OF WICHITA, a corporation, Plaintiff, vs. DELMAS NORTHCUT, a/k/a D. L. NORTHCUTT, and MARTHA L. NORTHCUTT, FIRST NATIONAL BANK, MADILL, OKLAHOMA, GLENN NORTHCUTT and TOMMYE NORTHCUTT; EXCHANGE NATIONAL BANK & TRUST COMPANY OF ARDMORE, OKLAHOMA; ACACIA PIPELINE CORPORATION, one and the same as ACACIA PIPELINE CORP.; NATURAL GAS PIPELINE CORP.; NATURAL GAS PIPELINE COMPANY OF AMERICA; KONAWA INSURANCE COMPANY, a corporation; and EUGENE EMBRY, Defendants.	)	Case No. C-86-36

JOURNAL ENTRY OF JUDGMENT AND DECREE OF FORECLOSURE

This cause came on for hearing before me, the undersigned Judge of the District Court of Marshall County, State of Oklahoma, on the Motion for Summary Judgment of the Plaintiff, The Farm Credit Bank of Wichita ("FCB"), on January 12, 1989. As set forth

below, the following appearances were entered by counsel for the parties:

Party	Counsel
The Farm Credit Bank of Wichita, formerly known as The Federal Land Bank of Wichita	G. Blaine Schwabe, III, of MOCK, SCHWABE, WALDO, ELDER, REEVES AND BRYANT A Professional Corporation
Delmas Northcutt and Lou Northcutt	Dan Little of LITTLE, LITTLE And WINDEL

The Court finds that the defendants, First National Bank, Madill, Oklahoma and Acacia Pipeline Corporation, although being duly served with summons and the petition of FCB herein, have failed to answer or otherwise appear in this action, that they are in default and that judgment should be rendered against them and in favor of FCB.

The Court further finds that the defendants, Natural Gas Pipeline Company of America, Konawa Insurance Company, Tommye Northcutt and Eugene Embry, although being served with notice of the Motion for Summary Judgment and notice of the hearing thereon,

and having had an opportunity to respond thereto, appeared not. (Hereinafter, First National Bank of Madill, Oklahoma, Delmas Northcutt, Lou Northcutt, Natural Gas Pipeline Company of America, Acacia Pipeline Corporation, Konawa Insurance Company, Tommye Northcutt and Eugene Embry shall be referred to collectively as the "Defendants".)

The Court further finds that the defendant, Exchange National Bank and Trust Company, Ardmore, has disclaimed any right, title or interest in and to the real property which is the subject of this proceeding.

The Court further finds that this case shall remain pending against the defendant, Glenn Northcutt, and that the entry of this judgment in favor of FCB is without prejudice to FCB to continue this case against the defendant, Glenn Northcutt, and any person claiming an interest in and to the Real Property (hereinafter defined) by virtue of their status as an heir, successor or assign of Glenn Northcutt.

The Court further finds that it has jurisdiction over all parties (except Glenn Northcutt) and the subject matter of this action.

Having reviewed the pleadings filed in this action, the promissory note and the real estate mortgage sued upon by FCB in this case, the Motion for Summary Judgment and Affidavit of Robert C. Maples, and documents attached thereto, and the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and the Response of Defendants Delmas Northcutt and Lou Northcutt and Brief in Support thereof and Affidavit and Supplemental Response Affidavit and Brief of Defendants Northcutt, the Court finds as a matter of law that there is no implied cause of action under the Agricultural Credit Act of 1987, which could entitle the Northcutts to any judicial relief thereunder and that there is no genuine issue with respect to any material fact and that judgment should be rendered in favor of FCB and against all

defendants as set forth more specifically hereinafter.

The Court further finds that there is due to FCB from the defendants, Delmas Northcutt and Lou Northcutt, upon the promissory note described in FCB's petition, the principal sum of $783,930.67, together with interest from and after October 3, 1988, at a per diem rate of $210.04, until paid, a reasonable attorney's fee and all costs of this action. The Court finds that FCB has waived all right to a personal judgment against Delmas Northcutt and Lou Northcutt, and therefore, FCB should be granted judgment in rem against the defendants Delmas Northcutt and Lou Northcutt, as well as all other Defendants with respect to such indebtedness, as set forth more specifically hereinafter.

The Court further finds that FCB has a valid, first and prior lien in and to the following described real property situated in Marshall, County, Oklahoma:

[Cite Description of Land]

(the "Real Property"), by virtue of a certain mortgage of real estate (the "Mortgage") dated July 6, 1982 and recorded in the office of the County Clerk of Marshall County, Oklahoma on the 6th day of July, 1982, in Book 441 at Page 387, after the required mortgage tax was duly paid thereon. FCB is entitled to judgment in rem against the Real Property and all Defendants in the amount of $783,930.67, together with accrued interest from and after October 3, 1988 at a per diem rate of $210.04, FCB's reasonable attorneys' fees and costs and the establishment of its Mortgage lien as a first, prior and superior lien on the Real Property. The Court further finds that the Mortgage provides that upon the occurrence of default, FCB may proceed to foreclose its Mortgage with or without appraisement, as FCB may elect at the time judgment is rendered. The Court further finds that FCB has elected to sell the Real Property with appraisement.

The Court further finds that the Defendants, First National Bank, Madill, Oklahoma, Tommye Northcutt, Acacia Pipeline Corporation, Natural Gas Pipeline Company of America, Konawa Insurance Company and Eugene Embry may claim some right, title or interest in and to the Real Property, but that such right, title and interest of the Defendants in and to such Real Property is junior, subordinate and inferior to the Mortgage lien of FCB.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that FCB have and recover on its Petition herein judgment in rem against the Real Property and all Defendants in the sum of $783,920.67, together with accrued interest thereon from and after October 3, 1988 at a per diem rate of $210.04 until paid, together with FCB's reasonable attorneys' fees and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Mortgage be and that the same is hereby foreclosed and the Real

Property is ordered to be sold to satisfy the judgment awarded to FCB herein, and that special execution and order of sale in foreclosure shall issue, commanding the Sheriff of Marshall County to levy upon the Real Property and after having the same appraised as provided by law, shall proceed to advertise and sell the same as provided by law and apply the proceeds arising from said sale as follows:

FIRST: In payment of the costs of said sale and of this action;

SECOND: In payment to FCB of the sum of $783,930.67, together with interest thereon at a per diem rate of $210.04 from and after October 3, 1988 to the date of sale;

THIRD: The residue, if any there be, be held to await further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED & DECREED that from and after the date or dates of sale of said Real Property under and by virtue of this judgment, that the Defendants, and all parties joined in this action, and each of them, and all persons claiming under

them, or any of them (except in the event of any such party as a purchaser at such sale), are hereby forever barred from asserting and are foreclosed of and from any and all right, title or interest in and to the Real Property or any part thereof, except as expressly provided herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff FCB, within thirty (30) days of the filing of this Journal Entry of Judgment and Decree of Foreclosure, shall submit affidavits or other evidence demonstrating the reasonable value of the services rendered by counsel for FCB so that the Court may award attorneys' fees to FCB pursuant to law.

Dated this 10 day of February, 1989.

Tim Colbert
JUDGE OF THE DISTRICT COURT

APPROVED:

MOCK, SCHWABE, WALDO, ELDER,
REEVES & BRYANT
A Professional Corporation

BY: Mary Robertson
G. Blaine Schwabe, III-OBA #8001
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ATTORNEY FOR THE FARM CREDIT BANK OF WICHITA

-and-

LITTLE, LITTLE, LITTLE & WINDEL

BY: Dan Little
Dan Little - OBA #5462

P. O. Box 618
Madill, Oklahoma 73446

ATTORNEY FOR DEFENDANT
DELMAS NORTHCUTT AND LOU NORTHCUTT

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS

DIVISION 3

April 3, 1991

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

72,579 - Federal Land Bank of Wichita, a corporation, Appellee v. Delmas Northcutt, a/k/a D.L. Northcutt, and Lou Northcutt, a/k/a Martha L. Northcutt; Appellants and First National Bank, Madill, Oklahoma; Glenn Northcutt and Tommye Northcutt; Exchange National Bank & Trust Company of Ardmore, Oklahoma; Acacia Pipeline Corporation, one and the same as Acacia Pipeline Corp.; Natural Gas Pipeline Corp.; Natural Gas Pipeline Company of America; Konawa Insurance Company, a corporation; and, Eugene Embry, Defendants.

Appellants' Petition for Rehearing is DENIED.

HUNTER, C.J. and GARRETT, P.J. concur; HANSEN, J. dissents.

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 3rd day of April, 1991.

s/ James P. Garrett, Presiding Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, June 5, 1991

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

72,579 The Federal Land Bank of Wichita, a corporation, v. Delmas Northcutt a/k/a D. L. Northcutt and Lou Northcutt a/k/a Martha L. Northcutt. Certiorari denied.
CONCUR: Opala, C.J., Lavender, Simms, Doolin, Wilson, Summers, JJ.
DISSENT: Hodges, V.C.J., Hargrave, Kauger, JJ.

s/Marion Opala, Chief Justice

APPENDIX B

Title 12 USCS Section 2201 in relevant part:

Notice of action on application

(a) Loan applicants. Each qualified lender to which a person has applied for a loan shall provide the person with prompt written notice of- -

(1) the action on the application;

(2) if the loan applied for is reduced or denied, the reasons for such action; and

(3) the applicant's right to review under section 4.14 [12 USCS §2202].

(b) Distressed loans. Each qualified lender that has a distressed loan outstanding that is subject to restructuring requirements under this Act shall provide, in accordance with regulations prescribed by the Farm Credit Administration, the borrower with prompt written notice of- -

(1) any action taken with respect to restructuring the loan under section 4.14A [12 USCS § 2202a];

(2) if restructuring is denied, the reasons for such actions; and

(3) the borrower's right to review under section 4.14 [12 USCS § 2202].

Title 12 USCS Section 2202 in relevant part:

Reconsideration of actions

(b) Review of decisions. (1) Denials or reductions. Any applicant for a loan from a qualified lender that has received a written notice issued under section 4.13B [12 USCS § 2201] of a decision to deny or reduce the loan applied for may submit a written request, not later than 30 days after receiving a notice denying or reducing the amount of the loan application, to obtain a review of the decisions before the credit review committee.

(2) Denials of restructuring. A borrower of a loan from a qualified lender that has received notice, under section 4.13B]12 USCS § 2201], of a decision to deny loan restructuring with respect to a loan made to the borrower, if the borrower so requests in writing within 7 days after receiving such notice, may obtain a review of such decision in person before the credit review committee.

. . .

(d) Independent appraisal. (1) In general. An appeal filed with a credit review committee under this section may include, as a part of the request for a review of the decision filed under subsection (b)(1) or (2), a request for an independent appraisal, by an accredited appraiser, of any interests in property securing the loan (other than the stock or participation certificates of the qualified lender held by the borrower).

(2) Arrangement and cost. Within 30 days after a request for an appraisal under paragraph (1), the credit review committee shall present the borrower with a list of three appraisers approved by the appropriate qualified lender from which the borrower shall select an appraiser to conduct the appraisal the cost of which shall be borne by the borrower, and shall consider the results of such appraisal in any final determination with respect to the loan.

(3) Copy to borrower. A copy of any appraisal made under this subsection shall be provided to the borrower.
(4) Additional collateral. An independent appraisal shall be permitted if additional collateral for a loan is demanded by the qualified lender when determining whether to restructure the loan.
(e) Notification of applicant. Promptly after a review by the credit review committee, the committee shall notify the applicant or borrower, as the case may be, in writing of the decision of hte committee and the reasons for the decision.

Title 12 USCS Section 2202a in relevant part:

Restructuring distressed loans

(a) Definitions. As used in this part [12 USCS §§ 2200 et seq.]:

(1) Application for restructuring. The term "application for restructuring" means a written request- -

(A) from a borrower for the restructuring of a distressed loan in accordance with a preliminary restructuring plan proposed by the borrower as a part of the application;

(B) submitted on the appropriate forms prescribed by the qualified lender; and

(C) accompanied by sufficient financial information and repayment projections, where appropriate, as required by the qualified lender to support a sound credit decision.

(2) Cost of foreclosure. The term "cost of foreclosure" includes -

(A) the difference between the outstanding balance due on a loan made by a qualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;

(B) the estimated cost of maintaining a loan as a non-performing asset;

(C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as the result of the foreclosure, including attorneys' fees and court costs;

(D) the estimated cost of changes in the value of collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclosure or liquidate the loan and ending on the date of the disposition of the collateral; and

(E) all other costs incurred as the result of the foreclosure or liquidation of a loan.

(3) Distressed loan. The term "distressed loan" means a loan that the borrower does not have the financial capacity to pay according to its terms and that exhibits one or more of the following characteristics:

(A) The borrower is demonstrating adverse financial and repayment trends.
(B) The loan is delinquent or past due under the terms of the loan contract.
(C) One or both of the factors listed in subparagraphs (A) and (B), together with inadequate collateralization, present a high probability of loss to the lender.
(4) Foreclosure proceeding. The term "foreclosure proceeding" means - -
(A) a foreclosure or similar legal proceeding to enforce a lien on property, whether real or personal, that secures a nonaccrual or distressed loan; or
(B) the seizing of and realizing on nonreal property collateral, other than collateral subject to a statutory lien arising under title I or II [12 USCS §§ 2011 et seq., §§ 2071 et seq.], to effect collection of a nonaccrual or distressed loan.
(5) Loan. The term "loan" means a loan made to a farmer, rancher, or producer or harvester of aquatic products, for any agricultural or aquatic purpose and other credit needs of the borrower, including financing for basic processing and marketing directly related to the borrower's operations and those of other eligible farmers, ranchers, and producers or harvesters of aquatic products.
(6) Qualified lender. The term "qualified lender" means - -
(A) a System institution that makes loans (as defined in paragraph (5)) except a bank for cooperatives; and
(B) each bank, institution, corporation, company, union, and association described in section 1.7(b)(1)(B) [12 USCS § 2015(b)(1)(B)] but only with respect to loans discounted or pledged under section 1.7(b)(1)[12 USCS § 2015(b)(1)].
(7) Restructure and restructuring. The terms "restructure" and "restructuring" include rescheduling, reamortization, renewal, deferral of principal or interest, monetary concessions, and the taking of any other action to modify the terms of, or forbear on, a loan in any way that

will make it probable that the operations of the borrower will become financially viable.
(b) Notice. (1) In general. On a determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring, and include with such notice- -
(A) a copy of the policy of the lender established under subsection (g) that governs the treatment of distressed loans; and
(B) all materials necessary to enable the borrower to submit an application for restructuring on the loan.
(2) Notice before foreclosure. Not later than 45 days before any qualified lender begins foreclosure proceedings with respect to a loan outstanding to any borrower, the lender shall notify the borrower that the loan may be suitable for restructuring and that the lender will review any such suitable loan for restructuring, and shall include with such notice a copy of the policy and the materials described in paragraph (1).
(3) Limitation on foreclosure. No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section. . . .
(d) Consideration of applications. (1) In general. When a qualified lender receives an application for restructuring from a borrower, the qualified lender shall determine whether or not to restructure the loan, taking into consideration - -
(A) whether the cost to the lender of restructuring the loan is equal to or less than the cost of foreclosure;
(B) whether the borrower is applying all income over and above necessary and reasonable living and operating expenses to the payment of primary obligations;
(C) whether the borrower has the financial capacity and the management skills to protect the collateral from diversion, dissipation, or

deterioration;
(D) whether the borrower is capable of working out existing financial difficulties, reestablishing a viable operation, and repaying the loan on a rescheduled basis; and
(E) in the case of a distressed loan that is not delinquent, whether restructuring consistent with sound lending practices may be taken to reasonably ensure that the loan will not become a loan that it is necessary to place in nonaccrual status.
(2) Applications not required for restructuring plans. This section shall not prevent a qualified lender from proposing a restructuring plan for an individual borrower in the absence of an application for restructuring from the borrower.
(e) Restructuring. (1) In general. If a qualified lender determines that the potential cost of such qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall restructure the loan in accordance with the plan.
(2) Computation of cost of restructuring. In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including - -
(A) the present value of interest income and principal forgone by the lender in carrying out the restructuring plan;
(B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;
(C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and
(D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the

institution.
(f) Least cost alternative. If two or more restructuring alternatives are available to a qualified lender under this section with respect to a distressed loan, the lender shall restructure the loan in conformity with the alternative that results in the least cost to the lender.
(g) Restructuring policy. (1) Establishment. Each bank board of directors shall develop a policy within 60 days after the date of the enactment of this section [enacted Jan. 6, 1988], that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring policy of each qualified lender within the district.
(2) Contents of policy. The policy established under paragraph (1) shall include an explanation of --
(A) the procedure for submitting an application for restructuring; and
(B) the right of borrowers with distressed loans to seek review by a credit review committee in accordance with section 4.14 [12 USCS § 2202] of a denial of an application for restructuring.
(3) Submission of policy to FCA. Each bank board shall submit the policy of the district governing the treatment of distressed loans under this section to the Farm Credit Administration. Notwithstanding the duty imposed by the preceding sentence, the other duties imposed by this section shall take effect on the date of the enactment of this section [enacted Jan. 6, 1988].

Title 7 USCS Section 5101.

Qualifying States

(a) In general. A State is a qualifying State if the Secretary of Agriculture (hereinafter in this subtitle [7 USCS §§ 5101 et seq.] referred to as the "Secretary") determines that the State has in effect an agricultural loan mediation program that meets the requirements of subsection (c).

(b) Determination of Secretary. Within 15 days after the Secretary receives from the Governor of a State a description of the agricultural loan mediation program of the State and a statement certifying that the State has met all of the requirements of subsection (c), the Secretary shall determine whether the State is a qualifying State.

(c) Requirements of State programs. Within 15 days after the Secretary receives a description of a State agricultural loan mediation program, the Secretary shall certify the State as a qualifying State if the State program - -

(1) provides for mediation services to be provided to producers, and their creditors, that, if decisions are reached, result in mediated, mutually agreeable decisions between parties under an agricultural loan mediation program;

(2) is authorized or administered by an agency of the State government or by the Governor of the State;

(3) provides for the training of mediators;

(4) provides that the mediation sessions shall be confidential; and

(5) ensures that all lenders and borrowers of agricultural loans receive adequate notification of the mediation program.

Title 7 USCS Section 5103

Participation of Federal agencies

(a) Duties of the Secretary of Agriculture

(1) In general. The Secretary, with respect to each program under the jurisdiction of the Secretary that makes, guarantees, or insures agricultural loans- -

(A) shall prescribe rules requiring each such program to participate in good faith in any State agricultural loan medication program;

(B) shall, effective beginning on the date of the enactment of this Act [enacted Jan. 6, 1988], participate in agricultural loan mediation programs; and

(C) shall - -

(i) cooperate in good faith with requests for informa- tion or analysis of information made in the course of mediation under any agricultural loan mediation program des- cribed in section 501 [7 USCS § 5101]; and

(ii) present and explore debt restructuring proposals advanced in the course of such mediation.

(2) Nonbinding on Secretary. The Secretary shall not be bound by any determination made in a program described in section 501 [7 USCS § 5101] if hte Secretary has not agreed to such determination.

(b) Duties of the Farm Credit Administration. The Farm Credit Administration shall prescribe rules requiring the institutions of the Farm Credit System - -

(1) to cooperate in good faith with requests for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in section 501 [7 USCS § 5101]; and

(2) to present and explore debt restructuring proposals advanced in the court of such mediation.

APPENDIX C

IN THE DISTRICT COURT OF MARSHALL COUNTY,
STATE OF OKLAHOMA.

FEDERAL LAND BANK OF WICHITA, a corporation,	)	
Plaintiff,	)	
vs.	)	No. C-86-36
	)	Filed 10-17-89
DELMAS NORTHCUTT, et al.,	)	
Defendants.	)	

RESPONSE OF DEFENDANTS DELMAS NORTHCUTT AND LOU NORTHCUTT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

COME NOW Defendants Delmas Northcutt and Lou Northcutt and for their Response to Plaintiff's Motion for Summary Judgment allege and state that Plaintiff's Motion for Summary Judgment is premature and should not be granted for the following reasons:

1) The Plaintiff is a corporation duly created, organized and existing under and by virtue of an Act of Congress entitled "The Federal Farm Loan Act", approved July 17,1916, and acts amendatory thereto, and is now operating under the Farm Credit Act of 1971, 12 USCA §2201, et seq., as now amended by the Agricultural Credit Act of 1987. Delmas Northcutt and Lou Northcutt qualify as

borrowers of the Plaintiff and the note and mortgage involved herein qualify as loans. The note and mortgage involved herein and this foreclosure action are subject to and governed by the Agricultural Credit Act of 1987, being Public Law 100-233, January 6, 1988, which is incorporated herein with all its provisions by reference thereto.

2) Plaintiff's motion is premature and should not be granted because Plaintiff has not complied with the provisions of the Agricultural Credit Act of 1987, and the proper and required regulations thereunder, including the following acts of omission and commission which are known to these Defendants at this time based upon their limited information, but not limited to the following acts of omission and commission because Defendants do not have all necessary and required information pursuant to and under said Act.

A. The Plaintiff has not processed or completed the consideration of the Northcutt loan for restructuring and,

therefore, §4.14(7)(b)(3) is applicable, which states as follows:

"No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."

...

E. Plaintiff has not furnished Defendants Northcutt proper explanation and reasons for refusal to restructure, and the reasons given are not proper reasons under said Act and have not been reached based upon proper consideration of the information which should be considered.

F. The requirements for reconsideration of actions as set forth in §4.14 have not been met and, in particular, the Credit Review Committee did not property consider the independent appraisal.

...

I. Title 5, §501, et seq., of the Agricultural Credit Act of 1987 provides for state mediation programs, which requirements the State of Oklahoma has met. Defendants Northcutt have requested participation in the State

Mediation Program from the outset, but the Plaintiff was unwilling to participate in the mediation program until the Credit Review Committee had acted. Now that the Credit Review Committee has acted, the Plaintiff is willing to participate in the mediation program, but has wrongfully and illegally taken the position that its participation in the mediation program in good faith is not required as part of the restructuring procedure and that the limitation on foreclosure set forth in §4.14A(b)(3) is not applicable to completion of participation in the mediation program in good faith. The Plaintiff is required to participate in the mediation program in good faith and the limitation on foreclosure is applicable until the mediation phase is completed in good faith, which has not yet even begun.

...

IN THE DISTRICT COURT OF MARSHALL COUNTY,
STATE OF OKLAHOMA.

FEDERAL LAND BANK OF WICHITA, a corporation,	)	
Plaintiff,	)	
vs.	)	No. C-86-36
DELMAS NORTHCUTT, et al.,	)	Filed 1-4-
Defendants.	)	

SUPPLEMENTAL RESPONSE, AFFIDAVIT AND BRIEF OF DEFENDANTS DELMAS NORTHCUTT AND LOU NORTHCUTT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

...

PROPOSITION I

THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE AND IT WOULD NOT BE PROPER FOR THIS COURT TO CONSIDER OR TO GRANT THE MOTION FOR SUMMARY JUDGMENT AT THIS TIME.

On January 6, 1988, the U. S. Congress passed the AGricultural Credit Act of 1987, Pub.L.No. 100-233, 101 Stat. 1568-1717 (1988) (codified in various sections of the statutory authority for the Farm Credit System, 12 U.S.C.A. §2001-2279), which supported the Farm Credit System by making available up to four billion dollars of federal funds (12 U.S.C. §201.6.26 and

§2278b-6) and at the same time setting up and establishing a new and definitive system for restructuring relief to the farm and ranch borrowers of the Farm Credit System.

Unlike the previous law, the 1987 Act mandated and required that the Farm Credit System lenders follow specific procedures and steps in order to try to restructure the debts of the farmer and rancher and put in the following specific prohibition, to-wit:

> "No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section." (See Section 4.14(7)(b)(3) of Public Law or 12 USCA 2202(a)(7)(b)(3).)

There were no similar prohibition of any kind in the 1971 Act or 1985 amendments. This prohibition applies to the Farm Credit System and specifically to the Farm Credit Services (FCS), formerly The Federal Land Bank.

Specific requirements and procedures mandated by the 1987 Act to the Farm Credit Services include the following statutory sections which are copied from Public Law

100-233, which became codified as 122 USCA 2202(a):

[STATUTE CITED]

...

Based on the pleadings, affidavits, and depositions on file herein, it is clear that the Plaintiff is a qualified lender under the Act and that the Northcutt loan qualifies as a distressed loan under the Act. The above language is also clear in the prohibition that the Plaintiff may not continue any foreclosure proceeding before the Plaintiff has completed any pending consideration of the loan for restructuring. The language of prohibition could not be more clear and it could not be more clear that the Northcutt loan qualifies for the prohibition.

The Northcutts, in their Affidavits and REsponse, have listed a number of specific omissions and commissions on the part of the Plaintiff, which failed to meet the requirements of the 1987 Act and which would bring into effect the prohibition of

proceeding. On a number of these omissions and commissions, there will be disputed facts as to whether the requirements have or have not been met. Consider, however, the following example of an omission or commission on which there can be no dispute of fact because the facts are undeniable. Even though the Northcutts had requested mediation from the beginning, there had not been any meeting or participation in mediation in any way, shape or form prior to the time that the Plaintiff filed its last Motion for Summary Judgment herein. The clear-cut question is therefore presented as to whether the Plaintiff could proceed with a Motion for Summary Judgment before even beginning, much less completing, the mediation process.

...

Unlike the earlier Act and amendments, the 1987 Act was passed amidst the most grave agricultural crisis since the Great Depression and was passed by Congress to save

the agricultural sector and to save the family farm. Unlike earlier amendments, the 1987 Act set forth detailed requirements, procedures, and policies to benefit the farmer and rancher debtor. Unlike the 1971 Act and the 1985 amendments, the Congressional records show clearly that a private right of action was intended.

The judicial test used to determine whether an implied right of action exists under a federal statute is based upon the following test from Cort v. Ash, 422 U.S.65, 955 Ct.2080, 45 L.Ed.2d 26 (1975):

> "(1) The plaintiff is one of the class for whose especial benefit the statute was enacted; (2) there is an explicit or implicit indication of legislative intent either to create such a remedy or deny one; (3) it is consistent with the underlying purpose of the legislative scheme to imply such a remedy; and (4) the cause of action is one traditionally relegated to state law, in an area basically the concern of the states."

...

In the case of "In the Matter of Dilsaver, U. S. Bankruptcy Court, D. Nebraska, 86 Bankruptcy Reporter, May 13, 1988, a copy of

which is attached, Judge Mahoney found that the 1987 Act not only was applicable to debtors, but found that it was applicable to debtors in bankruptcy and required the Federal Land Bank to provide the appropriate restructuring process as requested by the debtor.

...

In the case of Harper v. Federal Land Bank of Spokane, U.S.D.C. of Oregon, Civ. No. 88-449-PA, June 27, 1988, a copy of which is attached, Judge Panner considered such comments and reasoned and ruled as follows:

> "Congress entitled Title I of the Act 'Assistance to Farm Credit System Borrowers.' In that Title, Congress established broad rights for borrowers and mandatory duties for lenders. The Harpers are borrowers within the farm credit system and, as such, are one of the class for whose especial benefit the statute was enacted.
>
> "The legislative history supports an implied right of action. Defendants contend that because Congress considered enacting an express right of action and later deleted that section, no right of action may be implied. Generally this would demonstrate congressional intent to deny a private right of action. Here, however, a close

look at the legislative history demonstrates Congress' intent to provide such a right.

...

The different cases cited by the Plaintiff, especially Redd v. Federal Land Bank of S.T.Louis, 851 F.2d 219 (8th Cir. 1988), which were decided under the previous Farm Credit Act and the 1985 Amendment have little precedential value in regard to the 1987 Act because the 1987 Act is so different in its language and scope and also in the Congressional history leading up to its passage.

...

In the case of Leckband v. Naylor, U.S.D.C. of Minnesota Third Division, Civ.-88-167, May 17, 1988, a copy of which is attached, Judge Edward DeVitt reasoned as follows in finding that there was an implied cause of action under the 1987 Act.:

[QUOTE]

...

In the case of Stainback v. Federal Land

Bank of Jackson, No. GC88-25-NB-O (N.D.Miss.Feb.5,1988), a copy of which is attached, the Stainbacks moved for a temporary restraining order and preliminary injunction to stop the foreclosure sale of their farm. The STainbacks had submitted a written application to the Federal Land Bank on January 5, 1988, asking that their loan be considered for restructuring under the 1987 Act. The Federal Land Bank denied considered of the loan for restructuring. The Court held as follows:

> "It is the opinion of the Court that this is a case of first impression and that the defendant has not complied with the provisions of the Agricultural Credit Act of 1987 enacted on January 6, 1988, particularly the restructuring provisions. The Court finds that the plaintiffs are entitled to consideration for restructuring of their loan by the defendant to determine the least-cost alternative.
>
> ...

EXHIBIT "C"

1. The trial court erred as a matter of law in its legal finding and conclusion that the Agricultural Credit Act of 1987, being Public Law 100-233, 101 Stat. 1568-1717 (1988), 12 USCA §2001-2279, had no implied cause of action and that Defendants Northcutt could not be eligible or entitled to any judicial relief thereunder regardless of acts of omission or commission by the Plaintiff in failing to follow the requirements of said Act.

2. The trial court erred in granting Plaintiff's Motion for Summary Judgment because Plaintiff's Motion for Summary Judgment was premature and it was not proper for the Court to consider or to grant the Motion for Summary Judgment at that time because the Plaintiff had not complied with the provisions of the Agricultural Credit Act of 1987.

3. The trail court erred in its finding that there were no substantial

controversies as to any material facts when there were multiple substantial controversies as to material facts specifically set forth in the Affidavit of Defendants Northcutt as follows:

A. The Plaintiff has not processed or completed the consideration of the Northcutt loan for restructuring and, therefore, §4.14(7)(b)(3) is applicable, which states as follows:

"No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section."

B. Defendants Northcutt and the note and mortgage involved herein and this legal proceeding qualify as a distressed loan and foreclosure proceeding as set forth in §4.14A(3) and (4) which state as follows:

[Statute Cited]

C. The Northcutts made application for restructuring according to the terms of said Act, but the Plaintiff has not properly determined the cost of foreclosure as required in §4.14A(2) and has not made the

proper "computation of cost of restructuring" as required by 4.14A(e) and the restructuring thereunder.

D. The Plaintiff has not developed a restructuring policy as required in 4.14A(g) which states as follows:

"g) RESTRUCTURING POLICY.--
"(1) ESTABLISHMENT.--
Each farm credit district board of directors shall develop a policy within 60 days after the date of the enactment of this section, that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring policy of each qualified lender within the district."

E. Plaintiff has not furnished Defendants Northcutt proper explanation and reasons for refusal to restructure, and the reasons given are not proper reasons under said Act and have not been reached based upon proper consideration of the information which should be considered.

F. The requirements for consideration of actions as set forth in §4.14 have not been met and, in particular, the Credit Review Committee did not properly consider the independent appraisal.

...

I. Title 5, §501, et seq., of the Agricultural Credit Act of 1987 provides for state mediation programs, which requirements the State of Oklahoma has met. Defendants Northcutt have requested participation in the State Mediation Program from the outset, but the Plaintiff was unwilling to participate in the mediation program until the Credit Review Committee had acted. Now that the Credit Review Committee has acted, the Plaintiff is willing to participate in the mediation program, but has wrongfully and illegally taken the position that its participation in the mediation program in good faith is not required as part of the restructuring procedure and that the limitation on foreclosure set forth in §4.14A(b)(3) is not applicable to completion of participation in the mediation program in good faith. The Plaintiff is required to participate in the mediation program in good faith and the limitation on foreclosure is applicable until the mediation phase is completed in good faith, which has not yet even begun.

Section 503--Participation of federal agencies, provides as follows: [Statutes cited]

[Index to Petitioner's Brief filed in the Supreme Court of Oklahoma on Appeal on August 11, 1989]

INDEX

APPENDIX

[Index to Petitioner's Reply Brief filed in the Supreme Court of Oklahoma on Appeal, October 9, 1989]

INDEX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FEDERAL LAND BANK OF WICHITA, a corporation,	)
Appellee,	)
vs.	No. 72579
DELMAS NORTHCUTT and LOU NORTHCUTT,	)
Appellants.	)

PETITION FOR REHEARING

COME NOW Appellants herein, Delmas and Lou Northcutt (Northcutts), and allege and state as follows:

1. On the 12th day of January, 1989, the Trial Court sustained a Motion for Summary Judgment filed by the Federal Land Bank of Wichita (FLB) in a foreclosure proceeding against the Northcutts.

2. On the 7th day of February, 1989, the Northcutts filed a Petition in Error alleging the Trial Court erred in granting a Motion for Summary Judgment because there were genuine issues of material

fact before the Trial Court concerning the FLB's compliance with the Agricultural Credit Act of 1987 (the Act) and which provides that no qualified lender may foreclose or continue any foreclosure proceeding with respect to any distress loan before the lender has completed any pending consideration of the loan for restructuring as those terms are defined in the Act and further requires that the FLB participate in good faith in a State Agricultural Loan Mediation Program.

3. The record before the Trial Court on the Motion for Summary Judgment reflects evidentiary material filed by the Northcutts establishing that the FLB had not complied with the mandatory legislative directives of the Act. The FLB presented absolutely no evidence to refute the admissible evidence presented by Northcutts relating to the defense asserted by Northcutts.

4. In a decision filed February 12, 1991, Division III of the Court of

Appeals of the State of Oklahoma (this Court) found the Northcutts' contention that the Bank had not complied with applicable statutory regulations was supported by admissible evidence; that the Northcutts, the FLB, and the loan in question were subject to the Act, which provides that no qualified lender may foreclose or continue any foreclosure proceeding with respect to any distress loan before the lender has completed any pending consideration of the loan for restructure, but then this Court stated:

> "The Northcutts do not deny that the Bank (FLB) in fact considered their loan for restructuring. Their loan, however, was judged by the Bank's (FLB's) Credit Review Committee not to be worthy of restructuring."

The Court then relied upon the Trial Court's holding that mediation is not required as a matter of law before foreclosure could be entered and continued, "We do note that Bank (FLB) did submit itself to mediation and attended the first hearing, but that the Northcutts did not pursue mediation." The

decision of the Trial Court was affirmed with a vote of 2-1. This Court has directly misinterpreted the trial record and misstated the facts in the trial record.

5. The Northcutts respectfully request that this Court grant a rehearing based upon the following:

A. In the decision of February 12, 1991, this Court found that the Northcutts, the FLB, and the loan in question were subject to the Agricultural Credit Act of 1987, but dismissed the Northcutts' argument on the appeal by stating "The Northcutts did not deny that the FLB had considered their loan for restructuring and, further, their loan was judged by the FLB's Credit Review Committee to not to be worthy of restructuring." This Court failed to address the issue argued on appeal. The Northcutts strongly and vehemently deny that their loan was considered for restructuring as that term is defined and as the procedure is mandated in the relevant statutes. The

admissible evidence presented by Northcutts on the Motion for Summary Judgment established that the FLB had not complied with specific mandatory applicable statutory provisions relating to consideration of their loan for restructuring and, therefore, the Northcutts were denied their right to statutory consideration of loan restructuring prior to foreclosure. The Act provides that the FLB could not continue any foreclosure proceeding until completion of the statutory consideration of the loan for restructuring. Northcutts are NOT simply challenging the correctness of any decision relating to restructure, but furnished evidence that they were not afforded the procedure for consideration of restructure required by statute prior to foreclosure. Northcutts respectfully request that this Court grant a rehearing for proper consideration of this substantial issue argued on appeal.

B. In their Opposition to the Motion for Summary Judgment, the

Northcutts submitted evidence that the Act of required good faith participation by the FLB in a state mediation program and that the FLB had not submitted itself to ANY mediation. This Court in its Opinion of February 12, 1991, stated:

> "We do know that Bank (FLB) did submit itself to mediation and attended the first hearing, but that the Northcutts did not pursue mediation."

This statement in the Opinion is without evidentiary foundation and totally contrary to the record presented to the Court on the Motion for Summary Judgment and is badly in error. The Northcutt Affidavit, the only admissible evidence relating to this issue, clearly and unequivocally stated that the FLB failed to participate in any mediation program. Northcutts respectfully request that this Court grant a rehearing giving consideration to the evidence and record presented to the Trial Court for consideration on the Motion for Summary Judgment.

C. The Northcutts request that this Court grant a rehearing on its decision that good faith participation in mediation as required in the Act is not required before a party may continue with a foreclosure proceeding. Title 7 USCS §§5101-5106, Mandating Good Faith Participation in Mediation by the FLB is a part of the Act. The question of whether the FLB, a party subject to the Act, will be required to participate in mediation before proceeding with foreclosure in the courts of this state is an issue that has not been previously decided in this state. It is a question of law to be determined by the Oklahoma Courts. The Court of Appeals is not bound by any trial court determination on this issue of law and question of substance. Rehearing should be granted for reconsideration of this important issue relating to the requirement placed on the FLB by the Federal Statutes which regulate the activity of the FLB and which effect the

substantial rights of distressed borrowers in this state.

WHEREFORE, the Northcutts respectfully request that this Court grant their Petition for Rehearing and address the legal issues before the Court concerning the FLB's failure to grant Northcutts statutory consideration for restructuring and good faith participation in mediation, all as required in the Agricultural Credit Act of 1987, prior to continuation of any foreclosure proceeding.

Respectfully submitted

Dan Little, OBA #5462
Little, Little, Little & Windel
P. O. Box 618
Madill, OK 73446
Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FEDERAL LAND BANK OF WICHITA, a corporation, Appellee,	)
vs.	No. 72579
DELMAS NORTHCUTT and LOU NORTHCUTT, Appellants.	)

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The Northcutts set forth three major arguments in support of their Petition for Rehearing. The first relates to the FLB's failure to give a legal, statutorily prescribed, consideration to the Northcutts' request for restructuring prior to the FLB continuing with foreclosure proceedings. The second relates to the statement set forth in the Opinion of February 12, 1991, wherein this Court states, contrary to the record, that the FLB did submit to mediation and attended the first hearing, but that the Northcutts did not pursue mediation. (The evidence before the Court on the Motion for

Summary Judgment clearly and explicitly reflects the FLB did not submit itself to any mediation proceedings as required by the Act prior to filing its Motion for Summary Judgment.) Thirdly, this Court failed to give adequate consideration to a substantive issue of law not heretofore determined by the Courts of this State.

PROPOSITION I

THE NORTHCUTTS RESPECTFULLY REQUEST A REHEARING OF THE OPINION OF FEBRUARY 12, 1991, BASED UPON THIS COURT'S FAILURE TO ADDRESS THE SUBSTANTIAL ISSUE OF MATERIAL FACT PRESENTED IN THE RECORD OF THE TRIAL COURT ON THE MOTION FOR SUMMARY JUDGMENT RELATING TO THE FLB'S DUTY TO COMPLY WITH STATUTORY PROCEDURE RELATING TO RESTRUCTURING PRIOR TO PROCEEDING WITH ANY FORECLOSURE ACTION.

Title 12 USCS §2202a(b)(c) states as follows:

> "Limitation on foreclosure. No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this Section." [Emphasis Added.]

In an Affidavit dated October 17,

1988, the Northcutts furnished evidence that the FLB, in their alleged consideration of their loan for restructure, had not determined the cost of foreclosure as required by statute (Record, pg.45).

Title 12 USC §2202a(a)(2) provides:

> "Cost of foreclosure. The term "cost of foreclosure" includes--
> (A) the difference between the outstanding balance due on a loan made by a qualified lender and the liquidation value of the loan, taking into consideration the borrower's repayment capacity and the liquidation value of the collateral used to secure the loan;
> (B) the estimated cost of aintaining a loan as a nonperforming asset;
> (C) the estimated cost of administrative and legal actions necessary to foreclose a loan and dispose of property acquired as the result of the foreclosure, including attorneys' fees and court costs;
> (D) the estimated cost of changes in the value of collateral used to secure a loan during the period beginning on the date of the initiation of an action to foreclose or liquidate the loan and ending on the date of the disposition of the collateral; and
> (E) all other costs incurred as the result of the foreclosure or liquidate of a loan."

The Affidavit and evidence submitted by Northcutts further provided evidence that the FLB had not made a proper computation of cost of restructuring as required by statute (Record, pg.45). Title 12 USCA §2202a(e) provides:

> "Restructuring. (1) In general. If a qualified lender determines that the potential cost to such qualified lender of restructuring the loan in accordance with a proposed restructuring plan is less than or equal to the potential cost of foreclosure, the qualified lender shall restructure the loan in accordance with the plan.
> (2) Computation of cost of restructuring. In determining whether the potential cost to the qualified lender of restructuring a distressed loan is less than or equal to the potential cost of foreclosure, a qualified lender shall consider all relevant factors, including--
> (A) the present value of interest income and principal foregone by the lender in carrying out the restructuring plan;
> (B) reasonable and necessary administrative expenses involved in working with the borrower to finalize and implement the restructuring plan;
> (C) whether the borrower has presented a preliminary restructuring plan and cash-flow analysis taking into account income from all sources to be applied to the debt and all assets to be

pledged, showing a reasonable probability that orderly debt retirement will occur as a result of the proposed restructuring; and (D) whether the borrower has furnished or is willing to furnish complete and current financial statements in a form acceptable to the institution."

Northcutts further stated in their Affidavit that the FLB had not developed and furnished them the restructuring policy as mandated by law (Record, pg. 45). Title 12 USCS §2202a(g) provides:

"Restructuring policy. (1) Establishment. Each bank board of directors shall develop a policy within 60 days after the date of the enactment of this section [enacted Jan. 6, 1988], that is consistent with this section, to govern the restructuring of distressed loans. Such policy shall constitute the restructuring policy of each qualified lender within the district.
(2) Contents of policy. The policy established under paragraph (1) shall include an explanation of--
(A) the procedure for submitting an application for restructuring; and
(B) the right of borrowers with distressed loans to seek review by a credit review committee in accordance with section 4.14 [12 USCS §2202] of a denial of an application for restructuring.

Further, 12 USCS §2202a(b)(1)(A) provides:

> "In general. On a determination by a qualified lender that a loan made by the lender is or has become a distressed loan, the lender shall provide written notice to the borrower that the loan may be suitable for restructuring, and include with such notice--
> (A) a copy of the policy of the lender established under subsection (g) that governs the treatment of distressed loans;"

The Northcutts furnished evidence that the FLB had not furnished Northcutts the proper explanation and reasons for refusal for restructure as required by statute. Title 12 USCS §2201b(2) provides:

> "Distressed loans. Each qualified lender that has a distressed loan outstanding that is subject to restructuring requirements under this act shall provide, in accordance with regulations prescribed by the Farm Credit Administration, the borrower with prompt written notice of-if restructuring is denied, the reasons for such action."

The Northcutts in their Affidavit further presented evidence that the FLB and the Credit Review Committee did not give the statutorily required consideration to an

independent appraisal (Record, pg. 45). Title 12 USCS §2202(d)(1)through(3) provides:

> "(d) Independent appraisal. (1) In general. An appeal filed with a credit review committee under this section may include, as a part of the request for a review of the decision filed under subsection (b)(1) or (2), a request for an independent appraisal, by an accredited appraiser, of any interests in property securing the loan (other than the stock or participation certificates of the qualified lender held by the borrower).
> (2) Arrangement and cost. Within 30 days after a request for an appraisal under paragraph (1), the credit review committee shall present the borrower with a list of three appraisers approved by the appropriate qualified lender from which the borrower shall select an appraiser to conduct the appraisal the cost of which shall be borne by the borrower, and shall consider the results of such appraisal in any final determination with respect to the loan.
> (3) Copy to borrower. A copy of any appraisal made under this subsection shall be provided to the borrower."

In its Opinion of February 12, 1991, Division III correctly found that the FLB, the Northcutts, and the loan in question were subject to this law. However, the Court

stated:

> "The Northcutts do not deny that the Bank in fact considered their loan for restructuring. Their loan, however, was judged by the Bank's Credit Review Committee not to be worthy of restructuring."

The Northcutts vehemently denied the FLB followed the statutory procedure and that their loan was considered for restructuring as required by law as set forth above. The Northcutt Affidavit described errors of omission which as errors of omission must be described in broad and general terms, but which create prima facie issues of fact. The FLB filed no counter affidavit and for purposes of the Motion for Summary Judgment, the Northcutt Affidavit setting forth the errors of omission must be taken as true. The FLB presented not one shred of evidence to contradict the evidence presented by Northcutts. The question for this Court to determine is whether the record before the Trial Court on the Motion for Summary Judgment reflects whether there was a substantial controversy as to any material

fact and that one of the parties was entitled to judgment as a matter of law. See 12 O.S. 1981, Chapter Two, App., District Court Rule 13. The material issue of fact established by Northcutt was whether the FLB complied with mandatory statutory procedural requirements in considering the Northcutt loan for restructuring as those terms are defined by statute. The record before the Trial Court did present a substantial controversy, and established for purposes of the Motion for Summary Judgment that the FLB's acts so failed to follow the requirements of the Agricultural Credit Act of 1987, that the Northcutts' loan did not receive consideration for restructuring and the acts of the FLB were arbitrary, unreasonable, and capricious.

The law relating to Summary Judgments is set forth in Hargrave v. Canadian Valley Electric CoOperative, Okl., 792 P.2d 50 (1990):

> "Summary judgment is a procedural device used to reach a final

judgment where there is no dispute as to any material facts. Manora v. Watts Regulator Co., 748 P.2d 1056 (Okla.1989). The trial court may look beyond the pleadings to evidentiary material to determine whether any issue remains for jury determination. Flanders v. Crane, 693 P.2d 602, 605 (Okla.1984). The court may consider evidence outside the pleadings such as depositions, admissions, answers to interrogatories and affidavits. 12 O.S. 1981, Ch. 2 App., Rule 13. All inferences in the evidence must be taken in favor of the party opposing the motion. Manora, 60 O.B.J. at 3003. Summary judgment is improper if under the evidence, reasonable men could reach different conclusions from the facts. Runyon v. Reid, 510 P.2d 943, 946 (Okla.1973). The moving party has the burden of showing that there is no substantial controversy as to any material fact. Loper v. Austin, 596 P.2d 544,545 (Okla. 1979). After this showing, the opposing party must demonstrate that existence of a material fact in dispute which would justify a trial. Martin v. Chapel, Wilkinson, Riggs & Abney, 637 P.2d 81,84 (Okla.1981). These burdens of proof may be met by circumstantial evidence. Manora, 60 O.B.J. at 3003."

The FLB did not meet its burden of showing no substantial controversy and the Northcutts clearly demonstrated the existence of a material fact in dispute.

The Northcutts are not merely seeking to have the Courts judicially review the reasonableness of any FLB's lending decision and to substitute the Court's lending judgment for that of the FLB's as indicated in this Court's Opinion. Rather, the Northcutts seek reversal of the Trial Court's decision on the basis that the record before the Trial Court on the Motion for Summary Judgment raises a material issue of fact relating to the FLB's compliance with the mandated statutory procedural requirements of the Agricultural Credit Act of 1987 prior to proceeding with any foreclosure action.

This Court failed to give proper consideration to the Northcutt Affidavit which clearly raised an issue of material fact relating to the FLB's compliance with the Agricultural Credit Act of 1987. A rehearing should be granted to review this issue.

PROPOSITION II

NORTHCUTTS RESPECTFULLY REQUEST A REHEARING ON THE OPINION OF THE COURT OF FEBRUARY 12, 1991, BASED UPON THE ISSUE OF MATERIAL FACT PRESENT IN THE RECORD BEFORE THE TRIAL COURT ON THE MOTION FOR SUMMARY JUDGMENT RELATING TO THE FLB'S PARTICIPATION IN A STATE MEDIATION PROGRAM.

In the last paragraph of its Opinion this Court states:

> "We find that upon review of the pleadings, briefs, evidence and transcripts that the trial court correctly found that there is no substantial controversy as to any material fact and that the Bank (FLB) was entitled to judgment as a matter of law."

The record before the Trial Court on this Motion for Summary Judgment contained no evidence presented in any transcribed hearings. The only transcript before the Court of Appeals was a transcript of the argument presented by attorneys at the hearing on the Motion for Summary Judgment. No evidence was presented at this hearing, no parties presented sworn evidence. There were no stipulations or admissions and no allegations or statements made by attorneys

in arguing the Motion for Summary Judgment that could be considered as evidentiary material to be considered by the Trial Court or by any Appellate Court in reviewing a determination on a Motion for Summary Judgment.

Rule 13 of the District Court clearly specifies the record to be submitted and reviewed by a Court in ruling upon a Motion for Summary Judgment. It provides that depositions, admissions in pleadings, stipulations, answers to interrogatories and requests for admissions, affidavits and exhibits on file and submitted to the court in regard to the motions for summary judgment may be considered.

As stated previously, the only evidentiary material before the Court to be properly considered in its ruling was the Affidavit submitted by the FLB found in the record on page 32, the Northcutt Affidavit appearing in pages 44-48 of the record and a Supplemental Affidavit submitted by

Northcutts found on page 112 of the record. No other evidence was presented to the Court with the Motions relating to Summary Judgment, and the record contains no other admissible evidence of fact, relevant or material, to the motion.

In ruling on a Motion for Summary Judgment the court may not take into consideration evidence which might have been presented to the Court, but is limited to the depositions, admissions, stipulations of fact, and allegations filed with the motions.

Rule 13 of the Rules of the District Court provide in relevant part:

> "a. A party may move for judgment in his favor on the ground that the depositions, admissions in the pleadings, stipulations, answers to interrogatories and to request for admissions, affidavits, and exhibits on file <u>filed with his motion or subsequently filed with leave of the court</u> show that there is no substantial controversy as to any material fact...Reference shall be made in the statement to the pages, paragraphs and/or lines of the depositions, admissions, answers to interrogatories and to requests for admissions, affidavits, exhibits, or other materials whether filed by the

moving party or by the adverse party and a copy of the material relied on shall be attached to the statement.

. . .

"b. ...the adverse party shall attach to the statement, affidavits and other materials containing facts that would be admissible in evidence, but the adverse party cannot rely on the allegations or denials in his pleading...and reference shall be made to pages, paragraphs, and/or lines of the depositions, admissions, answers to interrogatories and to request for admissions, affidavits, exhibits, and other materials whether filed by the moving party or by the adverse party, and he shall attach to the statement the portions relied upon. All materials set forth in the statement of the movant which are supported by admissible evidence shall be deemed admitted for purposes of the summary judgment unless specifically controverted by the statement of the adverse party which is supported by admissible evidence." [Emphasis Added.]

As stated previously, the only record submitted by the parties herein for consideration on the Motion for Summary Judgment is the Affidavit submitted by FLB with the Motion reflected on page 32 of the Record and the Affidavits of the Northcutts

in opposition to the Motion reflected on pages 44-48 and 112 of the Record. No other material was submitted either in support of or in opposition to the Motion for Summary Judgment.

At the hearing on the Motion, the Trial Court made inquiry of the attorneys regarding facts related to the Motion and issues before the Court. However, this was not an evidentiary hearing. Neither attorney was under oath for the purpose of presenting testimony, and clearly any statements made in response to the questions reflected a substantial ontroversy as to the material facts.

Consideration by the Trial Court of the attorneys' statements made at the hearing on the Motion for Summary Judgment constitutes an improper trial of fact issues and is highly improper. In Bellmon v. Barker, Okl., 760 P.2d 813 (1988), the Supreme Court stated that approximately one-third of its case load involves appeals from

summary judgment and that many have been entered prematurely. In that case, an employer submitted one affidavit by a general supervisor stating that a discharge letter was a correct copy of the one sent to the employee. Citing Rule 13 of the District Court, the Supreme Court stated the employer did not provide an affidavit from a nurse to support its assertion that the employee was told to return to work or an affidavit from a member of management stating that the employee had been seen loitering. Neither did the employer offer any evidence to show that the employee was incompetent. On the other hand, the worker did not respond to the motion either by submitting affidavits in opposition thereto or by providing any evidence to show that she properly performed her duties. The Court stated:

> "Neither party Complied with Rule 13. However, because the employee stated a prima facie case, the entry of summary judgment was premature."

The Court also stated:

"Without a showing that evidence is available, mere contentions and arguments cannot and will not make it true." [Emphasis Added.]

In Frey v. Independence Fire and Casualty Company, Okl., 698 P.2d 17 (1985), the Supreme Court held that a ruling on a Motion for Summary Judgment must be rested on the Record which is then before the Court rather on one that could have been assembled. Further, on an appeal from the ruling on the Motion for Summary Judgment, the reviewing court is always limited to issues actually presented by law as by reflected by the Record.

See also Flanders v. Crane Company, Okl., 693 P.2d 602 (1984); Gilmore v. St. Anthony Hospital, Okl., 598 P.2d 1200 (1979); and Flick v. Crouch, Okl., 434 P.2d 256 (1967), wherein the Supreme Court holds that on Motions for Summary Judgment there can be no trial of fact issues. The function is to determine whether there are any genuine issues of material facts and the Court may not weigh the evidence on a Motion for

Summary Judgment.

As stated previously, the Northcutts presented admissible evidence wherein they alleged that the FLB had not complied with the requirements regarding restructuring and mediation. The FLB presented no evidentiary material relating to these matters. At the hearing on the Motion for Summary Judgment on January 12, 1989, the attorney for the FLB was arguing the applicability of the Agricultural Credit Act of 1987 when as reflected on page 12 of the transcript of the hearing, the Court queried,

> "How do I know that the estructure opportunity has been provided? Is that in one of these files?"
>
> Mr. Schwabe (FLB): "I think it's in the Affidavit of the Defendants. They complained that it was not properly considered by the Farm Credit Bank, the Federal Land Bank."
>
> The Court: "So you were just relying on their Affidavit?"
>
> Mr. Schwabe: "Yes, sir, I think it's their burden to come forward to prove the defense in order to stop a summary judgment in this case."

The attorney for the FLB continued, misrepresenting the assertions set forth by the Northcutts in their Affidavit, claiming the Northcutts were merely complaining about the decision rendered by the FLB on their restructure application. In fact, the Northcutts' Affidavit contains evidence and assertions that the FLB failed to comply with the statutory procedure. The Court and FLB's attorney then discussed the Northcutts' remedies in the federal courts. The attorney for FLB relayed information alledgedly contained in Northcutts' application for reconsideration before a Credit Review Committee. Discussion then followed relating to the role of Credit Review Committee. FLB's attorney then asserted,

> "No, Sir, there is also the state procedure for arbitration, we've gone through that as well, and I think we showed up at the hearing and the Northcutts appeared and said they weren't really ready to do anything. Their other creditors weren't there, it's been a year of frustration for all parties in the case, but the point of this case, in this motion today is we have done what we were duty bound to do.

> We have accepted a restructure application, we have considered it, we have afforded their right to appeal, we have gone through a mediation. There is no settlement, it's time for judgment to be entered." (Tr., pg.16)

None of the information contained in this argument was before the Trial Court in the form of evidence to be considered on the Motion for Summary Judgment. These were totally unsubstantiated arguments and assertions by FLB's attorney which the Northcutts strongly deny and assert to be untrue. This information was not presented in the form of evidence for consideration by the Trial Court nor review by an Appellate Court in addressing the Motion for Summary Judgment.

Northcutts' attorney responded to these assertions by stating:

> "Before the committee hearing, from the very beginning they (Northcutts) wanted to go into mediation, but it was refused. The affidavit has set forth that in filing the Motion for Summary Judgment, prior to even beginning the mediation hearings, that the Federal Land Bank has acted in violation of the prohibition and

has also acted not in good faith, arbitrarily and capriciously. The Northcutts have also set forth other failures in connection with a number of other requirements, but I want to focus in just on that clear cut and omitted omission that this Motion for Summary Judgment was filed before they ever even began mediation proceedings. Now, there's a disputed question of fact as to where the mediation proceedings are, whether they're finished, whether they were acted in good faith, but there is no dispute of fact that this motion was filed before the mediation proceedings ever began."
(Tr., pg. 23)

Page 25 of the transcript reflects the following:

The Court: "Assume that I said that the..are they finished with their restructure attempts, your clients?"

Mr. Little (Northcutt): "No, your Honor."

The Court: "Well, they say they are."

Mr. Little: "That's the disputed question of fact."

The Court: "For Who?"

Mr. Little: "You mean who is to determine it?

The Court: "Yeah. If I say well let them go ahead and continue restructure and they say they're

finished restructuring so what are you going to do then?" (Tr., pg. 25)

FLB's attorney further argues:

"And they say, now that the Credit Review Committee has acted, the Plaintiff is willing to participate in the mediation program. And we are, and we went and Mr. Little shows up and says, 'We're not ready.' Now the only thing that's going to be served by denial of this summary judgment motion is the continuing delay process."

The Court: "You mean you've tried to mediate through the State?"

Mr. Schwabe (FLB): "We have tried, we have appeared by ourselves without the other creditors of these people."

The Court: "Well, my gosh." (Tr. pg. 31)

The Court responded to Northcutts' attorney:

"Well, why should you be given the opportunity to drag your feet? If they want to mediate, why should..you know, you're the one who has got the land and they want their money or land, and it looks like you're just dragging your feet. If they wanted to mediate through the State Agricultural Mediation Program, I don't see how you can just say 'Well, no we're not going to do that, we're going to drag our fee some more.'"

Mr. Little: "Your, Honor, we

requested mediation from the very beginning and we have letters to that effect..."

Mr. Schwabe (FLB):

"And that's not the truth because we wrote
your clients in June and told them where to write to set up mediation with the state program. They responded finally I believe in August or September and set up the October meeting, at which you appeared and said you were not ready to proceed because you wanted to negotiate with another party." (Tr. pg. 32-33)

Mr. Little responded that based upon the posture of the Motion for Summary Judgment, these discussions were premature and the issue to be determined was whether or not these issues of fact were in dispute. (Tr.,pg.33)

Attorney for FLB further states:

"Now I represent that it's my understanding that my co-counsel wrote Mr. Little on June 24, 1988 to suggest that he contact the State Mediation Service in order to set up mediation proceedings. A mediation meeting was set up on September 23rd." (Tr. pg. 36)

After further discussion relating to mediation, Mr. Schwabe (FLB) stated:

"The last meeting didn't take very long because they came in and didn't have anything new to discuss.

Mr. Little: "Your Honor, I disrespectfully (sic) disagree with that. That's beyond the Affidavit, but if we're going to say that we didn't have anything to discuss, that's absolutely wrong." (Tr. pg. 37).

Mr. Little again reminded the Court that they were there on a Motion for Summary Judgment and were beyond the scope of review for the Motion. (Tr. pg.38) The issues of fact were to be determined at a later time if the Motion for Summary Judgment was premature because the record to be properly considered reflected an issue of fact.

The Court then queried concerning a possible refusal by the Northcutts to mediate. Mr. Little responded:

"That won't be necessary. If we refuse to mediate, then it becomes a moot point and we obviously lose."

The Court: "Well, he has already said you refused once."

Mr. Little: "Your, Honor, I don't think he would say that."
(Tr. pg. 40)

Mr. Schwabe (FLB) concluded his argument with the reiteration of their contention the Northcutts' dissatisfaction with a lending decision not to restructure their loan.

Mr. Little (Northcutt) responded:

> "Your, Honor, that completely misses the point. Obviously, if we were satisfied with the decision, we would not be here today. I mean that completely misses the point of, are they required to follow the Act, not whether we are satisfied or dissatisfied."
> (Tr. pg. 45)

None of the assertions constituted admissible evidence, however, it is clear from a review of the transcript and the decision entered by this Court on February 12, 1991, mere assertions and arguments were given consideration on a review of a Motion for Summary Judgment. Issues of fact are not to be determined at the hearing on the Motion for Summary Judgment. If there is a substantial controversy as to any material fact, the Court should have overruled the Motion for Summary Judgment and held a

hearing with properly admitted testimony and other evidence to determine these issues. The Record clearly reflects there was a substantial controversy as to material facts relating to the FLB's compliance with the statutes warranting reversal of the decision of the Trial Court. It is obvious from the references to statements of the Trial Court that its decision and the decision of this Court were based on matters not properly before the Trial Court. Northcutts respectfully request a rehearing by this Court with proper consideration to the Record on the Motion for Summary Judgment.

PROPOSITION III

THE AGRICULTURAL CREDIT ACT OF 1987 REQUIRES GOOD FAITH PARTICIPATION BY THE FLB IN THE STATE MEDIATION PROGRAM, AND THE RECORD BEFORE THE TRIAL COURT REFLECTS THE FLB DID NOT SUBMIT ITSELF TO MEDIATION PRIOR TO PROCEEDING WITH FORECLOSURE PROCEEDINGS. NORTHCUTTS RESPECTFULLY REQUEST A REHEARING BY THIS COURT ON THE DUTY OF THE FLB TO PARTICIPATE IN MEDIATION PRIOR TO PROCEEDING WITH A FORECLOSURE ACTION.

As a part of the Agricultural

Credit Act of 1987, the same legislation mandating consideration for restructure prior to foreclosure, Congress provided as codified in 7 USCS §5103(a)(1)(A):

> "Duties of the Secretary of Agriculture in General.
> The Secretary, with respect to each program under the jurisdiction of the Secretary that makes, guarantees, or insures agricultural loans--(A.) shall prescribe rules requiring each program to participate in good faith in any state agricultural loan mediation program; (B) shall, effective beginning on the date of the enactment of this Act [enacted Jan. 6, 1988], participate in agricultural loan mediation program; and (C) shall--(i) cooperate in good faith with request for information or analysis of information made in the course of mediation under any agricultural loan mediation program described in Section 501 [7 USCS §5101]; and (ii) present and explore debt restructuring proposals advanced in the course of such mediation."

As argued in Proposition II, the only evidence presented to the Trial Court and on record with the Court of Appeals relating to mediation is the Affidavit filed by Northcutts which states the State of Oklahoma does have a certified mediation

program which met the standards of the Act of 1987 but that the Farm Credit Services (FLB) failed to participate in the mediation program. (Record, pg. 112; Affidavit of Jan. 3, 1989). In their Affidavit of October 17, 1988, filed with their Opposition to the Motion for Summary Judgment, Northcutts clearly stated that although FLB had expressed a willingness to participate in the mediation program, there had been no mediation prior to filing of the Motion for Summary Judgment. (Record pg. 46)

In its Opinion this Court accepted the Trial Court's determination of law that mediation was not required as a matter of law before the foreclosure could entered. The Court made no reference to the Federal authorities presented by the Northcutts that mortgage foreclosure actions are traditionally regarded as matters of state law and the Federal Courts have recognized that by denying a borrower the right to pursue affirmative remedies in the federal

courts under the Agricultural Credit Act of 1987, the borrowers are not denied their rights in state courts. The Ninth Circuit Court of Appeals stated in Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (1989):

> "Moreover, the argument that a private right of action must be implied or else borrowers will be without a remedy overlooks the apparent right in some states of a borrower to allege the failure to afford restructuring rights as an affirmative defense to foreclosure. See Federal Land Bank of St.Paul v. Bosch, 432 N.W.2d 855, 858-59 (N.D. 1988) (allowing the use of 1986 regulations as an affirmative defense in state foreclosure action); Overboe 404 N.W.2d at 449 (allowing use of 1985 Act as an affirmative defense in state foreclosure action)."

The Court went on, however,

> "But see Federal Land Bank of St. Louis v. Hopmann, 658 F.Supp. 92,94 (E.D. Arkansas 1987) (rejecting defense.)." [Emphasis Added.]

See also Rank v. Nimmo, 667 F.2d 692, 697 (Ninth Circuit, Cert Denied), 459 US 907, 103 Supreme Court 210, 74 L.Ed.2d 168 (1982) and Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181, Court of Appeals 8 (1990), wherein the Federal Court held that

foreclosure is an area "traditionally controlled by state law" citing Harper.

Foreclosure proceeding is an equitable proceeding. See Continental Federal Savings and Loan Association v. Fetter, Okl., 564 P.2d 1073 (1977); Murphy v. Fox, Okl., 278 P.2d 820 (1955); Lawton v. Lincoln, 200 Okl. 182, 191 P.2d 926 (1948). Northcutts assert that this Court may determine the FLB's failure to comply with the mandatory administrative laws give rise to a valid equitable defense to a foreclosure action. It is for the Oklahoma courts of to determine whether failure to follow the federally mandated mediation procedures set forth in the Agricultural Credit Act of 1987 will constitute affirmative equitable defenses to the foreclosure proceedings in the State of Oklahoma. This Court has failed to address this question of substance not heretofore determined by the courts of this state.

Northcutts requested in the Trial

Court and on on appeal that the Courts recognize a right to raise the issue of the FLB's failure to mediate as an affirmative defense to the foreclosure proceeding in the state action. It is for this state court to determine whether equity demands that the FLB participate in good faith in a mediation proceeding as required by law. The renewal and continuation of the foreclosure action by the filing of the Motion for Summary Judgment prior to the first mediation meeting is a clear violation of the statute and certainly does not demonstrate good faith participation. The Northcutts are entitled to this equitable defense.

If the statute is to have meaning, the Oklahoma Courts must enforce the clearly mandated unambiguous provisions of the Act which mandate participation in mediation by requiring such participation in good faith prior to foreclosure or continuation if already filed. The evidence and Affidavits presented by Northcutts raised a genuine

issue of material fact relating to this affirmative defense and compliance with the statute. This is an area of extreme importance to the distressed agricultural borrowers of this state. Congress prescribed and mandated the specific actions to be taken by the FLB. The Northcutts presented evidence that the FLB failed to comply. Northcutts respectfully request a rehearing on this important substantive issue.

WHEREFORE, it is respectfully requested that the Northcutts' Petition for Rehearing be granted based upon the reasons set forth.

Respectfully submitted,

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Attorney for Northcutts

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FEDERAL LAND BANK OF WICHITA, a corporation, Appellee,	)	
vs.	)	No.72579
DELMAS NORTHCUTT, a/k/a D. L. NORTHCUTT, and LOU NORTHCUTT, a/k/a MARTHA L. NORTHCUTT, Appellants,	)	
and	)	
FIRST NATIONAL BANK, MADILL, OKLAHOMA; GLENN NORTHCUTT and TOMMYE NORTHCUTT; EXCHANGE NATIONAL BANK & TRUST COMPANY OF ARDMORE, OKLAHOMA; ACACIA PIPELINE CORPORATION, one and the same as ACACIA PIPELINE CORP.; NATURAL GAS PIPELINE COMPANY OF AMERICA;	)	
KONAWA INSURANCE COMPANY, a corporation; and, EUGENE EMBRY, Defendants.	)	

PETITION FOR CERTIORARI

1. A copy of the Opinion upon which Appellants seek certiorari is attached hereto as Exhibit "A".

2. A. On February 12, 1991, Division III of the Court of Appeals affirmed the decision of the Trial Court granting summary judgment by a 2-1 Decision.

B. On April 9, 1991, Division III of the Court of Appeals denied Appellants' Petition for Rehearing by a 2-1 Decision.

3. Appellants are petitioning this Court for a Writ of Certiorari based upon the following:

A. Division III of the Court of Appeals has decided the question of substance not heretofore determined by this Court. This case involves the right of a borrower to allege the failure of the Federal Land Bank to afford restructuring as mandated in the Agricultural Credit Act of 1987 (The Act) as an affirmative defense to foreclosure. The Act mandates compliance with the restructure provisions before proceeding with any foreclosure proceeding.

Appellee, The Federal Land Bank of Wichita (Plaintiff in the Trial Court), filed foreclosure against Appellants Delmas Northcutt and Lou Northcutt (Defendants in the Trial Court) and proceeded to file a Motion for Summary Judgment. Northcutts

responded citing Title 12 USCS § 2202A(b)(c), which states as follows:

> "Limitation on Foreclosure. No qualified lender may foreclose or continue any foreclosure proceeding with respect to any distressed loan before the lender has completed any pending consideration of the loan for restructuring under this section." [Emphasis Added.]

Northcutts filed an Affidavit in opposition to the motion pursuant to Rule 13 of the Rules of the District Court furnishing specific evidence of the Federal Land Bank's failure to comply with this Federal Act relating to restructuring contending: a) the Federal Land Bank had not determined the cost of foreclosure as required by § 2202A(a)(2); b) had not computed the cost of restructuring as required by statute § 2202A(e); c) the Federal Land Bank had not developed and furnished Northcutts the restructuring policy as mandated by law in § 2202A(g); and d) the Federal Land Bank did not give consideration to an independent appraisal as required in §2202(d)(1)-(3).

The Federal Land Bank presented

absolutely no contrary evidence relating to compliance with the Federal legislation, but argued as a matter of law that the Northcutts were not entitled to relief based upon this Federal Act. The Federal Land Bank argued that the Federal Act created no basis for a private right of action and afforded no affirmative relief to the Northcutts in this foreclosure proceeding.

The Federal courts have generally held that the Agricultural Credit Act affords no implied right of action in the Federal courts. The decisions have specifically stated that foreclosure is an equitable proceeding and is a matter of state law. It is up to each state to determine whether a party is entitled to affirmative relief based upon these statutes in a state foreclosure proceeding. See Harper v. Federal Land Bank of Spokane, 878 F.2d 1172 (1989); Rank v. Nimmo, 667 F.2d 692, 697 (9th Cir. Cert.Denied); 459 US 907, 103 Sup.Ct. 210, 74 L.Ed.2d 168 (1982) and Zajac v. Federal Land

Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990). This action is a case of first impression in Oklahoma regarding this critical issue to Oklahoma farmers and ranchers.

The Trial Court found: "The court is going to find there is no implied cause of action under the 1987 Act." (Transcript p. 46)

Division III of the Court of Appeals stated:

> "There was no doubt raised that Appellants, Appellee, and the loan in question were all subjects of this law.",

but the Court of Appeals failed to address the critical issue by misstating the evidentiary record as follows:

> "However, the Northcutts do not deny that Bank in fact considered their loan for restructuring."

A review of the trial record reflects that the Northcutts, pursuant to Rule 13 of the District Courts, presented evidence in opposition to the motion specifically and vehemently denying such consideration and

establishing that the Bank had not followed the mandatory statutory procedure relating to restructuring. This evidence presented to the Court in response to the Motion for Summary Judgment was not countered by the Federal Land Bank in any fashion or manner. This statement by Division III of the Court of Appeals was without evidentiary basis and completely contrary to the record before the Trial Court on the Motion for Summary Judgment. Northcutts contend that it is without question that the record presents a material question of fact relating to the Federal Land Bank's compliance with the Agricultural Credit Act of 1987. The Court of Appeals failed to address the critical issue and decision made by the Trial Court finding that there was no "implied cause of action" afforded the Northcutts under the Agricultural Credit Act and, therefore, granting Federal Land Bank's Motion for Summary Judgment.

This Court should grant certiorari to

decide the question of substance relating to the right of a borrower to assert noncompliance with the Agricultural Credit Act of 1987 as a defense in a foreclosure proceeding by the Federal Land Bank in Oklahoma. A decision is necessary for the direction of the Trial Courts relating to this important Federal legislation and the Farm Credit crisis in this State.

B. The Court of Appeals decided a question of substance not heretofore decided by this Court relating to 7 USCS §5101-5106, a part of the Agricultural Credit Act of 1987. Section 5103 mandates that the Secretary of Agriculture shall prescribe rules requiring each (Federal Land Bank) program to participate in good faith in State Agricultural Loan Mediation Programs and to present and explore debt restructuring in the course of such mediation.

In response to the Federal Land Bank's Motion for Summary Judgment, the Northcutts presented evidence pursuant to Rule 13 of the

Rules of the District Court that the Federal Land Bank had not even begun this mandatory mediation process at the time the foreclosure and Motion for Summary Judgment were filed. The Federal Land Bank presented absolutely no evidence to the contrary but argued that the Act did not provide the Northcutts with any relief in the foreclosure proceedings.

The Trial Court stated:

> "As to the issue that the Motion for Summary Judgment is premature due to the failure of the parties to mediate under the State Mediation Program, it's this Court's opinion that [12 USCS Sec.2202A(b)(c)], which prohibits a lender from proceeding with any foreclosure proceedings before the lender has completed any pending consideration of the loan for restructuring under this section. I believe the key words in this particular section are the words 'this section'. And I don't believe that . . mediation does not fall under this section, and it falls under another section. So for that reason I don't believe the Plaintiff's motion is premature, due to their failure to mediate." (Transcript pgs. 46-47)

The Court of Appeals, Division III, stated:

> "The statutes requiring good faith

> participation and mediation, 7 USCS Sec. 5101-5106, do not make it a condition precedent to foreclosure. The trial court held that mediation was not required as a matter of law before the foreclosure could be entered."

This was an issue of law to be determined by the Court of Appeals. Foreclosure is an equitable matter within the purview of the State law and, as previously stated, it is for the courts of this State to determine whether they will require that a Federal institution comply with mandatory legislation relating to restructuring and mediation as a condition precedent to filing foreclosure in this state. The Court of Appeals failed to address this important and critical issue not heretofore determined by this Court. Defendants request that a Writ of Certiorari be granted to determine and give direction to the trial courts regarding this critical issue.

C. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned

such procedure by a trial court as to call for the exercise of this Court's power of supervision. In affirming the decision of the Trial Court, the Court of Appeals relied upon contentions and arguments not supported by evidence in the record on the Motion for Summary Judgment. A review in court is limited to issues actually presented by law as reflected by the record. See Frey v. Independence Fire & Casualty Company, Okl., 698 P.2d 17 (1985).

As previously stated, in response to the Federal Land Bank's Motion for Summary Judgment, the Northcutts presented evidence establishing that there was a genuine issue of material fact relating to the Federal Land Bank's compliance with mandatory Federal legislation in the Agricultural Credit Act of 1987 limiting foreclosure and providing that no qualified lender may foreclose or continue any foreclosure proceeding before completing consideration of the loan for restructuring as defined therein and evidence establishing

that the Federal Land Bank had not complied with legislation requiring mediation. As required in Rule 13, the Defendants presented Affidavits establishing the Federal Land Bank's failure to take the specific statutorily required steps relating to restructuring and establishing that the Federal Land Bank had not even begun the mandated mediation process prior to filing its Motion for Summary Judgment. The Federal Land Bank presented no evidence to the contrary, but argued that the Agricultural Credit Act of 1987 afforded no relief to the Northcutts.

On a Motion for Summary Judgment, it is the Court's duty to construe evidence tendered on the motion most favorably in favor of the opposing party. See Hargrave v. Canadian Valley Electric Cooperative, Okl., 792 P.2d 50 (1990). There were absolutely no facts before the Court by which it could be determined that the Federal Land Bank had complied with the provisions of the

Agricultural Credit Act of 1987. At the hearing on the Motion, the attorney for the Federal Land Bank argued:

> "The Land Bank and the Northcutts have been trying to restructure in accordance with the '87 Ag Credit Act, and the basis as I understand their response...is that they disagree with the credit decision of the Federal Land Bank in denying their restructure application." (Transcript p. 3)

and further argued:

> "And they say, now that the Credit Review Committee has acted, the Plaintiff is willing to participate in the mediation program. And we are, and we went and Mr. Little shows up and says, we're not ready. Now the only thing that's going to be served by denial of this Summary Judgment motion is the continuing delay process." (Transcript p. 31)

The Court inquired seeking evidence relating to the relevant facts in issue:

> "You mean you have tried to mediate through the state?" (Transcript p. 31)

Federal Land Bank's attorney answered,

> "We have tried, we have appeared by ourselves without the other creditors of these people." (Transcript p. 31)

The Court responded:

"Well, my gosh." (Transcript p. 31)

The Court questioned the attorney for Northcutts:

> "If they wanted to mediate through the State Agricultural Loan Mediation Program, I don't see how you can just say well, no, we're not going to do that, we're going to drag our feet some more." (Transcript p. 32)

Attorney for Northcutts responded,

> "Your Honor, we requested mediation from the beginning and we have letters to that effect." (Transcript p. 32)

The exchange continued. Attorney for Federal Land Bank:

> "That's not the truth because we wrote your clients in June and told them where to write to set up the mediation under the state program. They responded finally I believe in August or September and set up the October meeting, at which you appeared and said you were not ready to proceed because you wanted to negotiate with another party." (Transcript p. 33)

Mr. Little for the Northcutts responded,

> "Now I would have to respectfully disagree with that statement of facts. We're getting beyond the affidavits, but let's get back to the affidavits. We have alleged that we requested mediation from the beginning before the Committee action met. Now, the Motion for

> Summary Judgment was filed in violation of the prohibition before mediation ever began and that is the posture of this case now."
>
> [Emphasis Added.] (Transcript p. 33)

Clearly, the Trial Court was trying the fact issues and considering conflicting facts as presented by the attorneys in argument. This is contrary to the Oklahoma law relating to Motions for Summary Judgment. See Flanders v. Crane Company, Okl., 693 P.2d 602 (1984); Gilmore v. St. Anthony Hospital, Okl., 598 P.2d 1200 (1979); and Flick v. Crouch, Okl., 434 P.2d 256 (1967). There can be no trial of fact issues on a Motion for Summary Judgment.

The Northcutts appealed, arguing that the Trial Court erred as a matter of law in determining that the Federal Land Bank did not need to comply with the Agricultural Credit Act before proceeding with a foreclosure action in the Oklahoma courts. In affirming the decision of the Trial Court, the Court of Appeals Division III determined

the Act did apply, but determined:

> "The Northcutts do not deny that the Bank in fact considered their loan for restructuring. Their loan, however, was judged by the Bank's Credit Review Committee not to be worthy of restructuring."

The Court of Appeals further stated:

> "We find that upon review of the pleadings, briefs, evidence and transcripts that the trial court correctly found that there is no substantial controversy as to any material fact and that the Bank [Federal Land Bank] was entitled to judgment as a matter of law." [Emphasis Added.]

There was absolutely no evidentiary material in the trial record to support this statement of the Court of Appeals. The only evidentiary material relating to the Motion for Summary Judgment was the Affidavits submitted by Northcutts setting forth the specific acts of noncompliance by the Federal Land Bank. There were no evidentiary transcripts. It appears the Court of Appeals was trying the issues of fact and weighing "evidence" based upon allegations and statements made by attorneys in argument on

the Motion for Summary Judgment. In Bellmon v. Barker, Okl., 760 P.2d 813 (1988), this Court held that mere contentions and arguments without showing that evidence is available will not make it true. The Northcutts strongly deny the statements made by the Bank attorneys were correct, but those statements should have never been considered, right or wrong. The Motion for Summary Judgment must be rested on the record before the Court rather on one that could have been assembled, and on appeal from the ruling on a Motion for Summary Judgment the reviewing court is always limited to issues actually presented by law as reflected by the record. See Frey v. Independence Fire and Casualty Company, supra.

The only evidence relating to compliance with the Agricultural Credit Act of 1987 was the Affidavits submitted by Northcutts containing evidence of noncompliance. At the hearing on the Motion, the attorneys for the two parties made conflicting statements as

previously cited. There was no "evidence" presented to the Court at the hearing. Yet the Court of Appeals stated in their Opinion:

> "We do note that Bank did submit itself to mediation and attended the first hearing, but that the Northcutts did not pursue mediation."

There is no evidence in the trial record upon which to base this contention other than the allegations in the argument by Federal Land Bank's attorney at the hearing on the Motion for Summary Judgment. This assertion was vehemently denied by Northcutts' attorney and is still denied. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in its use of the record using argument as evidence on a Motion for Summary Judgment, and has so far sanctioned the procedure by the Trial Court in trying fact issues and weighing evidence on a Motion for Summary Judgment as to call for the exercise of this Court's power of supervision.

WHEREFORE, Northcutts respectfully

request that this Court grant its Petition for a Writ of Certiorari to consider and give direction to the Trial Courts on these important questions of law affecting the farm crisis and creditors and farmers throughout this state.

Respectfully submitted,

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